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A N
I N Q U I R Y
I N T O T H E
R I G H T o f A P P E A L
F R O M T H E
C H A N C E L L O R,
O R
V I C E C H A N C E L L O R,
O F T H E *Academiæ,*
U n i v e r s i t y o f C A M B R I D G E,
I N
M A T T E R S o f D I S C I P L I N E :

A D D R E S S E D T O
A F E L L O W o f a C O L L E G E.

To which is added,

A n A P P E N D I X :

C o n t a i n i n g s o m e O b s e r v a t i o n s o n t h e A U T H E N T I C
N A R R A T I V E , & c .

*Est genus hominum, qui esse primos se omnium rerum volunt,
nec sunt.* Terent.

L O N D O N :

P r i n t e d f o r J . P A Y N E a n d J . B O U Q U E T ,
i n P A T E R - N O S T E R R o w .

M . D C C . L I .



P. 10. l. 13. for of, read to.



An ADDRESS to
A FELLOW of a COLLEGE.

S I R,

AS you concluded our late conversation upon the right of appeal, with a request that I would draw out my sentiments upon that subject more at large, for your cooler and more mature consideration; I take this opportunity of presenting you with them accordingly, not indeed in so full and comprehensive a manner as the importance of the subject may seem to demand, but as much so at least as you could well expect, in so short a time, and amidst such a variety of necessary avocations.

THOUGH the case of Mr. A—— gave rise to the question you are so desirous to see fully canvassed, I shall not enter at pre-

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sent into any consideration of its merits; that being no further a matter of importance to the body of the university, than as it may happen to affect their general claim to an appeal, by being made a precedent in its favour, or otherwise. To them it is in reality a matter of indifference, whether the sentence pronounced on him, be confirmed or not; all they can be supposed to want is, to have his appeal admitted, and the cause reheard; and therefore the single question to be considered is, whether this ought or ought not to be done accordingly.

THAT for all grievances there is or ought to be some method of redress provided, is a position, the general truth of which I shall not contest: but still you must permit me to understand it with some restrictions and limitations. There is a great difference to be made, between the acts of men in a private, and in a judicial capacity: for every wrong done in the former, they are and may be made accountable; but where it is done in the latter, it frequently happens they can not. The verdict of a jury, for instance, may perhaps be wrong, and consequently extremely prejudicial to a person whose

whose cause depended before them ; and yet for this, as being a mere error of judgment, they shall not be liable to any *attaint*. Is it not possible at least, that the decision of the supreme court of judicature itself may be erroneous also ; and yet in this case, not so much as a rehearing can be obtained. Here then are instances, to which this general rule is not applicable : for in the former the agents may not be accountable, though their act be adjudged wrong, and as such reversed ; and in the latter, whatever hardship may be incurred, there is neither hope nor possibility of redress. What therefore are we to understand from this maxim of yours ? not, that a remedy is, or can be provided against every possible hardship ; not, that a number of jurisdictions are or ought to be established, each of which is to rectify the errors or abuses in that which is immediately subordinate to it ; but only, that there should be some competent means of redressing the injuries we receive from private persons, some proper method of preventing the perversion of power in those, who happen to be invested with public authority. But what particular means of redress shall be provided ; whether con-

lined to one judicature, or extended by appeal or otherwise to several; what hands authority shall be lodged in; what precise bounds set to it; and how far the person invested with it shall be accountable to any other or higher tribunal; are all of them points, that still must, and will depend upon the direction and appointment of each particular founder and legislator. Accordingly, if we consider the policy of the law of our country, we shall find a variety of remedies provided in some cases, a determinate method of redress in others; some processes are liable to be removed from one court to another; some again can only begin and end in the same court. In the statutes of particular colleges also, some competent authority is generally given to one or more persons, who in quality of visitors are empowered to interpret ambiguities, or redress the injuries done by particular members to others of the same society; but then their determination is final, all recourse to any other jurisdiction is prohibited, and that even in cases where the grievance may possibly proceed from these visitors themselves.

To what purpose then will this argument of yours from analogy serve? Will you say that the vice chancellor's determination in matters of discipline in the university, ought not to be final; when that of the master alone, or in conjunction with the two deans in some private colleges, certainly is? The reason in both cases appears one and the same; and if so, why the authority itself should be different, I own I see not.

HOWEVER let us suppose for once, that where a person apprehends himself aggrieved by the vice chancellor's sentence in a matter of correction, it is thought proper to grant him a right of appeal; let us suppose no particular direction given to whom the appeal shall lye; and let us proceed to inquire, to whom in that case it might with the least impropriety be made. Will you say, to the university, in order to be referred by them to delegates appointed out of their own body? Permit me at least to think otherwise, and to lay before you my reasons for so doing.

It is allowed that the vice chancellor is the supreme magistrate of the university in the chancellor's * absence ; that every other member of it, in whatever rank or station, is bound by oath to obey him, quatenus jûs fasque est ; that none of them are exempt from his authority ; and that it is his duty to make them sensible of the weight of it, whenever they act in contempt of it, and of the laws it is designed to enforce. This being the case, can an appeal be made with the *greatest propriety* from the vice chancellor ~~of~~^{to} the university, from the head to the body over which he presides, to a body which can only assemble by his authority, and deliberate upon nothing to which he has not given his previous approbation ? In every constitution of this kind, as there are certain rights and privileges respectively belonging to the head and its several members, jealousies probably do and ever will subsist

* The reader is desired to observe once for all, that the whole power of the chancellor devolves upon the vice chancellor in his absence.

Quicquid statutis nostris vel academiæ cancellario faciendum attribuitur, in ejus absentia hoc idem a procancellario fiat.

Statut. Regin. Eliz. c. 42.

subsist of encroachments on one side, and perhaps on both ; these are apt to beget a dislike and disapprobation of each other's acts, and from thence an inclination to reverse them is not very remote : and if to this be added, that the person who apprehends himself aggrieved may happen to be a member of the senate, and as such may possibly bear with indignation the thought of having any part of his conduct judicially animadverted upon ; if it be further considered, that his particular friends and acquaintance may possibly think the same in his case, and that all the advocates for and the warm asserters of independency will be sure to think so in every case ; I do and must say, that the vice chancellor's sentence would come with less propriety before, and be less likely to meet with a candid and impartial examination from, those persons to whose review you would have it submitted, than any others. The danger of partiality in the case I have mentioned, is surely at least full as great, as in matters of a nature merely civil ; and yet Mr. Tabor, who was registrar of the university in the reigns of James and Charles the first, says, when speaking only of the latter, *It has been observed, that some vice chancellors*
have

have delayed or put off mens causes almost a year together, fearing partial delegates.

NOR let it be urged, that the same objection would lye against appeals, in causes that are merely forensick: for there the vice chancellor cannot be made a party; breaches of the peace or discipline of the university are not there inquired into as such; and, in short, the judgment of the vice chancellor only, and not his power and authority, is there litigated and called in question.

ACCORDINGLY in all other corporate bodies I ever heard of, that of the university of Oxford not excepted, nothing of that kind has been established. In collegiate foundations particularly, no act of discipline of the head was, I fancy, ever liable to be reversed by any of the subordinate members; though they are generally his constituents, and in conjunction with him, in the same manner as the university with the concurrence of the vice chancellor, may be and sometimes are empowered to make a kind of statutes or by-laws. Nay, I am even inclined to think, that in case you yourself

self were authorized to new model the statutes of your own college, you would not chuse to vest in your brethren, the fellows, such a power of controlling the acts of the master ; and why a limitation of the same nature should be thought more reasonable, in the case of the supreme magistrate of the university, I own myself at a loss to imagine.

I HAVE thus far examined the matter in general, and abstracted from all considerations of what the constitution of the university really is or is not, in order to shew you, that some of your arguments are of too vague and indeterminate a nature, and admit of too many restrictions and limitations, to answer the purpose for which you alledge them ; and that others, however capable of affording a kind of presumptive evidence of a right of appealing somewhere, conclude strongly against the reasonableness of directing it to that tribunal at least, for the establishment of which you have so warmly contended.

BUT it is now high time to quit speculations, and proceed to facts ; to suspend our inquiries into what the constitution of the

university might have been, and coolly and dispassionately examine what in truth and reality it is.

I SHALL admit, that the university of Cambridge is, as it has generally been supposed to be, a corporation by prescription; that a power of making by-laws is incidental to every corporation as such; and consequently, that those made by our predecessors in remoter times were enacted by a competent authority. I shall also wave inquiring for the present, how far these have been since abrogated; and proceed to examine, whether, upon a supposition of their validity, a right of appeal from the vice chancellor's sentence in matters of discipline, could or could not be warranted by them.

IN the statute intituled *de rebellantibus cancellario*, which you so particularly recommended to my perusal, there are two cases distinguishable from each other. The first is, that of persons exacting private revenge, and refusing when called upon to make such satisfaction as the chancellor or university might think proper, for which they are ordered to be expelled the university

fity within three days: the second subjects
 persons "contra cancellarii quoque prohibi-
 tionem colluctantes, & aliàs sibi inobedi-
 entes, & contumaces," to the like punish-
 ment of expulsion. In the former case,
 there is no difference or exception of per-
 sons; but in the latter there is in the follow-
 ing words, "Verum si magistri regentes, vel
 aliquis eorum contra cancellarium colluctans,
 vel aliàs inobediens extiterit, eorum causa
 per electas ab aliis regentibus personas
 tractetur & terminetur." Let me ask now
 what can be inferred from hence? Nothing
 certainly prejudicial to the chancellor's ju-
 risdiction, where a regent at least is not the
 offender. Every other person is plainly and
 clearly subjected to it; if they had not been
 so, the regents would have had no occasion
 for an express clause of exception, in order
 to exempt themselves. I would ask also,
 what can be inferred even from this ex-
 emption? A right of appeal certainly can
 not. A regent, on the footing of this sta-
 tute, cannot be tried at all by the chancellor;
 the cognizance of his offence, and that *in*
the first instance, is expressly given to other
 judges, regents probably, and to be chosen
 by regents only: whence it is plain, that if

this law was even now in force, the benefit of it could not be extended to your elder brethren the non regents. It is observable also, and particularly from the statutes *de potestate procuratorum in defeſtu cancellarii*, & *in admiſſione ad quodlibet officium*, that the univerſity, even in the caſe of a regent or publick officer, were not authorized to take cognizance of any other offences, except the chancellor neglected or declined doing it. Wherever the chancellor did take cognizance, as he was empowered to do, aſſiſted by the proctors, who, by a claufe in the ſtatute *de rebellantibus cancellario*, were conſtituted his aſſeſſors, I apprehend his determination was final ; many particulars occurring in theſe ſtatutes, no way favourable to the ſuppoſition of any right of appeal. Thus in the *Forma bannitionis ſcholarium*, “ Nos, &c. univerſitatis Cantab. cancellarius — prædictos A, B, C, ſuis exigentibus demeritis tenore præſentium *bannimus*, ac tanquam membra putrida a communitate univerſitatis noſtræ prædictæ in his ſcriptis *penitus ſegregamus*, mandantes & firmiter *injungentes eiſdem* quatenus infra tres dies proxime ſequentes a die præſenti computandos *ab univerſitate prædicta ſe divertant*,
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postmodum ad eandem nullatenus reversuri :" and the statute *de pacis perturbatoribus* directs, " si contingat (quod absit) dictorum scholarium sic delinquentium aliquem seu aliquos contra dictum cancellarium vel ejus locum tenentem rebellem seu rebelles existere in præmissis, quod tunc *damno perpetuæ bannitionis ipso facto supponantur.*" Again, expulsion is ordered to be inflicted upon the violators of the statute *contra ferentes arcus aut balistas infra municipium*, and actual excommunication is pronounced upon the disturbers of the peace, and the impugnors of the privileges of the university, by that intitled *de pacis perturbatoribus*, &c. and yet the chancellor could dispense with the observance of the one, and absolve all and singular offenders against the other : neither of which branches of authority could with any degree of propriety be vested in him, if he had not been intrusted with a full executive power.

THOUGH I do not recollect, that you recommended to my particular consideration any other statute but that *de rebellantibus cancellario*, I have given the whole a careful perusal, notwithstanding the *δυσωρία* with

with which they abound are very discouraging; and yet I cannot find more than one, upon which to found a right of appeal properly so called. It is intitled *de judiciis*, &c. but as the causes it relates to are all of them betwixt party and party, it will by no means answer the purpose for which you want it.

I CANNOT help adding, that the only precedent I can find of an appeal being made in these remoter times in a matter of discipline, was when Dr. Buckmaster was vice chancellor, viz. about the year 1530 as I imagine; and then the appeal was not admitted.

UPON the whole then I am inclined to think, that your claim to an appeal in matters merely of correction and discipline, would not derive any great support from the old statutes, even upon a supposition of their entire force and validity: however, if in this I should happen to be somewhat mistaken, such a mistake could not be at all fatal to the cause I am defending; because, for the reasons which I shall now proceed to lay before you, they in reality are not the rule,
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by which its merits are or ought to be determined.

I IMAGINE I need scarce remind you, that Mr. *B——, who some years ago undertook to defend these old statutes, against a person of great learning and eminence in the university who maintained their utter invalidity, extended his defence to such of them only, as were not repealed by the later statutes of queen Elizabeth. All that seem opposite to hers, he allows to be † expressly abrogated and rescinded; what he contends for is, that the remainder were designed to be left in force. Whatever the queen's intentions might be, I cannot think that Edward the VIth, her brother, meant to spare any of them; the reason assigned for giving his statutes as mentioned in the preamble being, *ut antiquatis semibarbaris vestris & obscuris statutis, & propter vetustatem jam plerumque non intellectis, regiis deinceps legibus,*

* See his argument, with an answer to it, and his reply, printed in the year 1727.

† Statuta omnia, compositiones & consuetudines, quæ sacris scripturis, institutis nostris, aut istis statutis adversari videbuntur, abrogata & rescissa sunt, reliquis suo robore permansuris.

Statut. Regin. Eliz. c. 50.

gibus, & nostro latas auspicio pareatis. But be this as it will, and even supposing that some of these statutes were left in force by the queen, it will not still follow that they are so at this day. For the words * referred to in her statutes are permissive only, and not imperative, and consequently these old statutes could not derive any new force or vigour from thence; and it is a rule with civilians, that as laws are made at first by the suffrages of the legislature, so by a tacit consent they may be abrogated by disuse, such of them at least as for any considerable series of time have not been regarded and acted under, may for that single reason have ceased to be obligatory. Such parts of them as are not liable to this exception, may be found in the appendixes to Mr. B——'s argument and reply; but they are not considerable in any view, much less of any use in determining the question now before us.

I FOR my own part have reason to believe, there is not so much as a single instance upon record, of any cause either of

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* See the last clause in the preceding note.

correction or of a civil nature, commenced before any other person, or conducted in any different form and manner from that prescribed or permitted in queen Elizabeth's statutes; and particularly that no case can be produced of a regent master being tried according to the direction given in the old statute abovementioned, intituled *de rebellantibus cancellario*, or of the proctors acting as assessors to the chancellor or his representative in any cause of correction, though that is not only directed, but the direction declared perpetual by the said statute. If any of these old statutes could have kept their ground, it is natural to suppose that this would, which contained two clauses so favourable to the regents, as those of exempting them entirely from the chancellor's jurisdiction in certain cases, and constituting their brethren the proctors assessors to him in all matters of correction. The very nature of these privileges will not suffer us to suppose, that they would be lost by a neglect to claim them; and the proceedings of Mr. † Gatford the proctor in 1632 shew

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† He claimed the right of acting as assessor to the vice chancellor, and upon its being denied him appealed to the university; but as the vice chancellor was not inclined to admit

us, that this was not the case with regard to the latter of them at least. Some other reason must therefore be assigned for this, and, as it happens, a very good and indisputable one may be given accordingly; for by the 42d of queen Elizabeth's statutes, not only all scholars but all the scholastici are declared subject to the chancellor's jurisdiction, and the heads constituted his assessors in causes of correction instead of the proctors. I hope then we shall hear no more of this old statute, *de rebellantibus cancellario*; for it is not only abrogated tacito academix consensu, but as being expressly contrary to one of queen Elizabeth's. I shall hope the same also, and for the same reasons, in regard to the several old statutes intitled, *de modo committendi causas*, *de cancellarii potestate*, *de jurisdictione magistrorum*, *de modo convincendi perjuros*, and such others, as may any way seem to give a jurisdiction, which neither has been exercised for

admit his appeal, he seems to have presented a petition thereupon to the king.

Though the appeal had been admitted, 'tis possible he might have taken the same step, if the decision of delegates had been against him, as it most probably would; for in the year 1636, I find an appeal made by proctor Balaam, in the name of his client John Byatt, from the sentence of delegates to the king.

for many years, nor could be so, consistently with the queen's statutes given us under the great seal in the year 1570.

THE old statute *de judiciis*, &c. relates, as I have before observed, to causes betwixt party and party, and to no other; and as that is the case with regard to the 48th of the queen's statutes intitled *de causis forensibus*, that the latter is the rule by which all proceedings ought to be, as they actually have been, directed, is too evident to require any formal proof. Where a subsequent law, like that of which I am speaking, establishes a jurisdiction, directs the nature of the process, gives a right of appeal, prescribes the manner in which it is to be conducted, and the persons to whom it shall be made, and that without the least reference to any former laws, by which many particulars of the same kind were prescribed likewise; it cannot be supposed to be done with any other intentions, than those, of digesting into one single statute all that was thought worth retaining of the preceding ones, and of repealing the rest, to prevent the perplexity that usually arises from referring to a multiplicity of laws upon the

same subject, similar in some points, but different from and contradictory to each other, in many others. That queen Elizabeth considered her's as a perfect and compleat body of statutes, and intended that they should be so considered by the university, is evident from her own words in the preamble : and therefore we cannot well be esteemed rash, for supposing that to be the case in respect to any particular law, which was designed to be so with regard to the whole. Hence I do not see the necessity of proving in form, that the old statutes *de judiciis*, &c. are totally abrogated, (for it is notorious that the 48th of queen Elizabeth has alone been acted under) ; though to satisfy you of the real as well as apparent contrariety of some parts of them to that of the queen, I shall descend to some few particulars : such as, the sum deposited in case of an appeal, the right of appealing a second time, and that from an interlocutory as well as a definitive sentence, and the time limited for prosecuting an appeal. I might say the same also of the whole statute, *de modo veniendi ad lites seu diem amoris* : and as the prohibition contained in that which immediately precedes it, against batchelors

of

of canon or civil law, or other advocates by profession, being permitted to act as proctors, has never, or at least of late years, been regarded; I might thence infer the sense of the university to have been, that these old statutes were not even obligatory in such particulars, as were no way contrary to queen Elizabeth's.

BUT it is unnecessary to dwell longer upon so plain a point; a point which I am persuaded you will not contest with me; especially as I may appeal to what you shewed me of the state of Mr. Campbell's case in 1725, for its truth and even notoriety. The question there put is, *Has not the senior regent an appeal, there being nothing in the statutes to the contrary?* The gentleman who is supposed to have put this question, understood the statutes of the university too well, not to have quoted such parts of them as favoured a right of appeal in matters of correction, if any such could have been met with; and as he quotes none, it is natural to infer, that he himself was persuaded nothing of that kind could really be found. Hence he very prudently founds Mr. Campbell's claim upon the general equity of appeals,

peals, and the learned gentleman to whom it was referred as prudently puts it upon the same footing. He observes upon this occasion, that *Appeals are always admitted in those courts where the civil and ecclesiastical laws are in force, where penance, suspension, deprivation, or any censure is inflicted as the punishment of a fault*, and the observation is undoubtedly just; but then how happens it to follow, that the university, which is properly no court, or delegates who are only an occasional court, who are neither directed by ecclesiastical laws, nor have any thing to do with ecclesiastical censures, are entitled to receive appeals from the vice chancellor's sentence, where the suspension inflicted is merely academical. The laws that favour appeals in cases of ecclesiastical censure, as from the sentence of a bishop for instance, only favour such as are made to the archbishop his proper superior, and from thence to the supreme head of the church, the king himself, who takes cognizance of them by his delegates appointed under the great seal: I never heard that they favoured any appeals from a bishop to the body of his clergy, or rendered his acts liable to be controverted and reversed by them;

them; and therefore here again the similitude will not hold. I for my own part have always understood the constitution of an ecclesiastical court to differ in many particulars from that of a chancellor or vice chancellor of an university, but in none so widely as in this very point of appeals; for these are fully authorized, and even the order in which they are to be made expressly directed by the laws of the land, in the former case: whereas in the latter, our local statutes are the only authority, upon which *any appeals to the university at least* are, or can be pretended to be, founded and established. These ought then to have been laid before that learned civilian in the first place; and instead of taking it for granted, that there was nothing contained in them against an appeal, the inquiry should have been, whether there really was or was not. Had this been done accordingly, I am inclined to think, that he could not but have seen some reasons against extending that right to matters of correction; and that you may be the better enabled to judge, how far my sentiments in this particular are well grounded or otherwise, I shall now proceed to lay before you the opinions of two gentlemen

tllemen of unquestionable abilities and very great eminence at the bar, to whom, after stating the 42d and 48th of queen Elizabeth's statutes, some circumstances of Mr. A——'s behaviour, and that an appeal of the same nature with his was not quite unprecedented, the two following queries were put.

Q. 1. WHETHER in this case the vice chancellor and his assessors have not acted solely under the 42d statute, de cancellarii officio; and whether any appeal can lay against the suspension of A—— by virtue of that statute? Or whether this case must be deemed one of the causæ forenses, and of consequence subject to an appeal by virtue of the 48th statute, de causis forensibus?

Q. 2. WHETHER, if in the case above stated the said A—— hath a right to appeal from his suspension; the same right of appeal will not follow to every delinquent scholar, who shall be punished a trifling mulct or piece of exercise by the vice chancellor?

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Answer.

To Q. 1. I AM of opinion the vice chancellor's authority in the case above stated, is well founded by the 42d statute, de cancellarii officio ; and that the vice chancellor and his assessors acted under that statute ; and that this case does not fall under the 48th statute. And I am of opinion that an appeal does not lay in the present case.

To Q. 2. THIS in effect is answered by what I have said upon the first question. And if an appeal might be allowed in the present case, it would be of the most fatal consequence to all discipline in the university ; since it would take away all distinction between the two statutes, and every scholar who should fall under any censure or punishment inflicted by the vice chancellor might have his appeal, and the 42d statute would be entirely of no effect.

Dec. the 12th, 1750. W.N——.

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Answer.

To Q. I. UPON consideration of the two statutes above recited, it seems to me, that the first was calculated to give a jurisdiction and power to the chancellor, or in his absence to the vice chancellor, to interpose in criminal matters, i. e. in matters relating to discipline; the latter gives a jurisdiction or cognizance of civil matters, i. e. matters of controversy concerning civil rights: and therefore the first gives power, contumaces &c. suspensione graduum, carcere, aut alio leviori supplicio iudicio suo castigare; by the latter, power is given to determine causas & lites, viz. causas forenses, for that is the title of the statute. As to the first, I think that the jurisdiction is final in the first instance, for his power is iudicio suo castigare; and it must necessarily be so, for immediate imprisonment seems to be one of the punishments which he may inflict, against which there can be no appeal, for it may be executed before there can be any appeal. As to the other, viz. the civil jurisdiction, there

there the statute requires speedy determinations, but gives an appeal from his sentences in foro, and prescribes the manner of appealing. Upon these principles, I think, that no appeal can lye, the suspension of A—— being grounded, I think, on the statute de cancellarii officio; and that this is not causa forensis within the latter statute.

To Q. 2. IF all offences against the statutes are punishable by this statute, the punishments for the minora, as well as the majora delicta, would be appealable; which I think would be absurd.

Linc. Inn, Dec. the 13th, 1750.

R. W——.

THE opinions of these two learned gentlemen of the long robe, are founded upon what occurs only in the 42d and 48th statutes: if any other of the statutes had been laid before them, 'tis probable they would have discovered more particulars, inconsistent with the supposition of any right of appeal in matters of discipline. By the 43d statute, for instance, intituled *de officio procuratorum*

ratorum, a scholar who apprehends himself aggrieved by the proctors, may appeal to the chancellor, but not one word is said of any further appeal; which surely would not have been the case, if any such further appeal had really been intended. The chancellor is empowered also by the same statute, to punish a scholar, for the third offence in not responding in his turn, *pro arbitrio suo*; words at least as strong as those in the 42d statute, upon which one of these learned gentlemen lays a particular stress.

BUT if no appeal will lye from the sentence of the vice chancellor singly, it can never be supposed to do so, where his sentence is given with the assent of a majority of heads. The statute *de causis forensibus*, upon which alone the claim to an appeal in any case is founded, gives it from a vice chancellor, supposed to act without any assessors, and upon whom no necessity is imposed of acting with any; but in that, by which he is authorized to inflict the higher censures in matters of correction, assessors are expressly appointed, and he is only permitted to act with their concurrence. In matters of a civil nature then, his determination

tion is rendered dependent upon no judgment but his own ; but in such as are criminal, and may possibly call for the most severe animadversion, it must be conformable to that of several others : now what other reason can be well assigned for this, than that there was not the same necessity for guarding against a partial or erroneous sentence in the former case where an appeal would lye, as in the latter where it would not. If both had been equally appealable, it is plain, that the assent of a majority of heads would have been as unnecessary in causes of correction, as in any other ; it is directed however in those causes and in no other, and though confessedly not so full and effectual a limitation of the vice chancellor's authority, as an appeal to the university would have been, is the only one actually directed. What are we then to conclude from hence, but that as by a received rule of interpretation, a greater limitation cannot be understood, where smaller ones are expressly mentioned, the very omission amounts to a prohibition ?

THE 38th statute directs, that in case one of the esquire bedles is negligent in the dif-

discharge of his office, and continues to be so even after a second or third admonition, or commits any detestible crime which may reflect infamy upon the university itself, the chancellor, with the assent of the major part of his assessors, viz. the proctors and heads of colleges, may eject him from his office, and then proceed to elect another. I would ask now, whether it was ever supposed, that a bedle so ejected would have a right of appeal to the university; and if not, why the chancellor's act should not be final likewise in all other cases, where a like concurrence of assessors is given as well as required?

AGAIN, every person preaching, or publicly teaching, treating, or defending, any thing contrary to the established religion, or against any state, authority, dignity, or degree, ecclesiastical or civil, of the kingdoms of England or Ireland, shall, by the statute *de concionibus*, upon the chancellor's order given with the assent of the major part of heads, retract and publicly confess his error and temerity, or upon his refusal so to do, be for ever excluded from his college, and expelled the uni-

university by the same authority. Here I must ask a second time, whether the offender in this case was ever supposed to have a right of appeal to the university? I am inclined to think it will not be said that he has; I am sure at least, that he was not supposed to have any such right formerly. Mr. Cartwright, lady Margaret's professor of divinity, was removed from his professorship, for teaching contrary to the established religion in 1570, the very year in which queen Elizabeth gave us our present statutes, and no appeal appears to have been made by him. Two years after, Mr. Millen, fellow of Christ college, was expelled by the vice chancellor and heads, for refusing to retract a passage in a sermon, and he also made no appeal. Mr. Charke, fellow of Peter house, was expelled for the same offence in the same year, and so was Mr. Brown fellow of Trinity college the year after. These two appealed, as did Mr. Johnson, fellow of Christ college, upon whom the like sentence was passed by the vice chancellor and heads in 1588; but their appeals were not admitted. Notwithstanding this, Mr. Johnson refused to obey the sentence, upon which he was sent to prison by the vice chancellor, where

where he continued from the 19th of December, to the 9th of March following, and was then released ; but not till he had promised to depart the university as soon as he had disposed of his pupils and settled his affairs, the time allowed him for which was
 + only till Easter. In 1609, Mr. Rush, fellow of Christ college, was also suspended and silenced for a sermon, and upon his refusal to recant, actually expelled. These are the only cases I have met with, in which the vice chancellor was necessitated to proceed to sentence of expulsion upon this statute, and in them no appeal was admitted ; nor indeed can I find so much as one instance from the year 1570 to this day, in which an appeal was allowed in any other case, where the vice chancellor acted, in pursuance of the direction of the statutes, with the concurrence of a majority of his assessors. I cannot help adding further upon this occasion, that by the 35th statute, *de electione procuratorum*, the persons nominated by particular colleges in the order there prescribed, and presented to the vice chancellor before the first of August, are to be elected proctors by the regents, unless some legitimate cause or exception be al-
 ledged

ledged against them to him before the first of October, and be proved before and approved by him and the major part of heads of colleges, within the space of four days next ensuing: because I apprehend, that in this case also, no doubt can be made of the vice chancellor's determination, given with the assent of the major part of his assessors, being decisive and final.

BUT to return to the supposed right of appeal from the sentence of the vice chancellor only. We have already seen how it stands upon the footing of the statutes, and in the opinions of those who are the best qualified to explain them; and therefore our next enquiry shall be into the practice of the university, that being generally understood to be a pretty authentick interpreter of its statutes.

IF a right of this kind was really well grounded, it would have been frequently exercised without doubt. The vice chancellor's censures were not less frequent in former than in later times, and were at least full as severe: and though the impatience of restraint might not be either so great or so general then, as it has been

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since; yet, considering how partial mankind are apt to be to their own failings, and how unwillingly they submit to any animadversions, which carry with them any appearance of ignominy at least; it can scarce be supposed, that every individual person for a considerable series of time, should tamely acquiesce under a disgrace entailed upon him by the sentence of one person, which there was the least hope or possibility of wiping off by applying to others. Nay, if such applications had been warrantable by the statutes, they would scarce have been less numerous than those made in causes merely forensick: and yet, amongst the many appeals to be found upon record from the sentence of the vice chancellor, not so much as one can be produced in a matter of discipline and correction, before the year 1725; though such was the itch of appealing in other cases, that we find an appeal made to the university from a determination given by him in quality of visitor of Bennet college, with regard to a person elected into a fellowship there, before he was batchelor of arts compleat.

BUT in the ever memorable year above-mentioned, viz. the year 1725, Dr. S—ge,
who

who was then vice chancellor, having very rashly and precipitately suspended Mr. C——ll the senior regent, for contumacy, as he called it, in stopping several times, and without any reason assigned, diverse graces and supplicats of candidates for degrees; and having cited Mr. B——d the senior proctor to answer for his behaviour in threatening the bedle, for executing the vice chancellor's order, by telling Mr. C——ll to go down from his place at the table; the former of these two gentlemen thought proper to appeal to the university. The vice chancellor was prevailed upon to admit the appeal, and in consequence of it, he, who was the supreme magistrate of the university, was cited and arraigned for his conduct, before more supreme delegates; who, not content with reversing the whole of his proceedings, were pleased to condemn him, in the several sums of five pounds and fifty shillings under the name of damages, besides ordering him to pay costs of suit. And yet, to all this he tamely submitted, though there was not a single clause in any statute to authorise what they did; and though an offer was made of indemnifying him, if he would but controvert the legality of these

proceedings before a proper authority. But it was from those he called *his friends* that he received this treatment, and to *other persons* he was to be indebted for the means of redress; hence he was induced to acquiesce under it, adding, that he could not have done otherwise *without hurting the cause*: the meaning of which words were well understood, by those who knew the state of the university at that time.

AFTER so successful an attempt to humble a vice chancellor, and that before an academical tribunal, it is scarce to be wondered, that a second should be made soon after, by one of the most celebrated demagogues of those tumultuous times. The occasion, it must be confessed, was not very important; all that he could alledge against the vice chancellor being, that he would not promise previously to reading the articles exhibited, to allow proctors at the instance of the complainants, contrary to the request of the defendant, to a statute alleged, and to the practice of the court in many cases: but perhaps the less important the occasion was, the fitter it might be to answer the principal purpose for which it was intended;

ed ; I mean *that* of making the vice chancellor accountable to his constituents, for every act and particular of his conduct. The poor man, intimidated by the proceedings on the former appeal, scrupled not to admit this : delegates were appointed therefore by the university, and, as it happened, the choice fell on Dr. Craven of Sidney, Dr. Perkins of Queen's college (still living and prebendary of Ely), and Mr. Washington of Peter house ; all of them persons of unquestionable abilities, and great experience in all matters of an academical nature. These gentlemen were not ignorant of the precedent that had lately been made, without any warrant indeed from former precedents, but intended at least to overbalance them all, by being enrolled in the proctor's book with all the formality of an university statute. What authority delegates had to direct that, I shall not now enquire ; but that they did direct it, and that the direction was observed, is a plain and undoubted fact. But little, alas ! did these temporary law-makers foresee, that the tide, which then set so strong against the authority of the vice chancellor, for one rash and precipitate act, would, in less than five months,

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so far ebb and abate, as that succeeding delegates should, in contempt of the precedent which they had set them, and which was intended to serve as a kind of *charter of academical liberties* to all future ages, give sentence in the following words.

“ WHEREAS by a grace of the house, delegates have been chosen Oct. the 23d, 1725, in *causa appellationis inter dominum procancellarium & magistrum Davie*; we the said delegates, having taken the said matter into full and serious consideration, and also the direction of the statute *de causis forensibus*, on which is founded the whole power and jurisdiction of such delegates, and finding that there are no grounds for such appeals, wherein the vice chancellor is made *alter litigantium* or *pars appellata*, and likewise having before us *no precedent* of any such appeal in this university; have concluded and determined, and do hereby conclude and determine, that the abovementioned appeal is not within that statute, and does not lye before us the delegates, and therefore that we do dismiss it the court, and remit the cause to the proper judge.”

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HERE then you see the whole proceedings against the vice chancellor, upon the appeal of Mr. C——ll, solemnly declared null and unwarrantable, (for in that case he was made the *pars appellata*, was cited to appear as such, did appear by his proctor accordingly, and had judgment actually given against him), and even declared so by delegates chosen by the university, whose determination has never yet been overruled by succeeding delegates, or disregarded in subsequent appeals. For the two only appeals that have since been made, were in cases where there were *promoters*; and consequently, where the vice chancellor neither was nor could be made, *alter litigantium*, or *pars appellata*. But if Mr. A——ll's appeal had been admitted, the case would have been quite otherwise: for the vice chancellor, in suspending him for his rude contemptuous and disobedient behaviour to himself in court, during his trial for an offence alledged against him by the proctor, plainly acted *ex officio*; and therefore would have been the *pars appellata*, and as such cited and arraigned, contrary even to the determination of the last delegates that were,

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or I hope ever will be appointed, in a case of a similar nature. But the last words of that determination intimate, that there is a proper judge in these cases, though the university by its delegates is not so ; and if Mr. A——ll had moved the court of king's bench, as he talked of doing, and may perhaps still intend, he would soon have learnt from thence who that proper judge is. Nay, he might have learnt it even from the case of Dr. Bentley, as reported by lord Raymond ; for there it is admitted, that the Dr. could have had no relief from that * court, if the university had
return-

* Mr. Reeve for Dr. Bentley admitted, that if the university had returned, that the king was their visitor, as they might have done, it would have put an end to the dispute here ; but not having returned that they had a visitor, if it appears by the return, that the proceedings in the university have not been agreeable to the rules of justice, a peremptory mandamus ought to issue.—As the other side had agreed, that if the university had returned a visitor, it would have put an end to this mandamus ; so he (Mr. attorney general Yorke who argued for the university) could not but observe, that if there was a visitor, if the doctor was aggrieved by these proceedings in the university, he might have made his application there.—If courts have a jurisdiction and power to proceed by rules different from the common law, this court will not examine into the regularity of their proceedings on a mandamus. And therefore, if a mandamus is granted to restore a fellow of a college, if they return a visitor, though his sentence has been irregular, it is not examinable here. 1 Lev. 23, 65. 4 Mod. 106. Phillips vers. Berry.

Lord Raymond's reports. Hil. term. 16 Georgii regis.

returned as they might, that the king was their visitor : or even without going any further back than the year 1728, he might have found a precedent of the king's taking cognizance of a complaint against a vice chancellor, and settling and ascertaining a right, which by many people will be thought of at least as much consequence, as this of the appeal. What I mean, is the right of election in all cases, that of our representatives in parliament not excepted. But the whole of this I shall now lay before you, that you may both see the manner of making complaints to his majesty against a vice chancellor, and the method observed in hearing and determining them.

July the 25th, 1728.

At the court at Hampton-court.

Present

The KING's most excellent majesty

Archbishop of Canterbury

Lord Chancellor

Lord President

Lord Steward

Lord Chamberlain

Duke of Newcastle

G

Earl

Earl of Scarborough
Earl of Grantham
Earl of Portmore
Earl of Ilay
Earl of Uxbridge
Earl of Hallifax
Earl of Suffex
Viscount Townshend
Viscount Torrington
Mr. Treasurer of the Household
Lord Finch, Comptroller
Mr. Chancellor of the Exchequer
Lord Chief Justice Eyre
Lieut. Gen. of the Ordnance
Henry Pelham, Esq;

UPON reading this day at the board a report from the lords of the committee of his majesty's most honourable privy council, dated the 16th of this instant, in the words following, viz.

‘ IN obedience to your majesty's orders
‘ in council of the 19th of last month, re-
‘ ferring unto this committee the humble
‘ petition of the severall heads of colleges,
‘ doctors and masters of the university of
‘ Cambridge, whose names are thereunto
‘ sub-

' subscribed ; and likewise the humble pe-
 ' tition of John Bacon of Cambridge in the
 ' county of Cambridge : their lordships this
 ' day took the said petitions into considera-
 ' tion, which set forth, that on Wednesday
 ' the 12th of June last, the said John Ba-
 ' con was duly chosen a vintner for the said
 ' university of Cambridge, by a majority of
 ' legal and statutable votes ; but that, not-
 ' withstanding the said choice, Dr. Lambert
 ' the vice chancellor had ordered Thomas
 ' Whitstones to be declared duly elected
 ' vintner of the said university, to the ma-
 ' nifest prejudice of the rights and privi-
 ' leges of the members of the said univer-
 ' sity ; and therefore they prayed such re-
 ' lief in the premisses, as to your majesty's
 ' royal justice and wisdom should seem
 ' meet : and their lordships having there-
 ' upon heard the petitioners by their coun-
 ' sel learned in the law, and also counsel in
 ' behalf of Dr. Lambert the vice chancel-
 ' lor, and the said Thomas Whitstones ; and
 ' having considered of the several statutes
 ' and graces made by the said university of
 ' Cambridge, for the better regulating e-
 ' lections in the said university, do find, that
 ' in the year 1698, the following grace was

‘ unanimously made by that university, viz,
 “ Cum ortæ sæpius ob controversum suffra-
 ‘ giorum jus offensæ litesque gravissimæ, cer-
 ‘ tius aliquid de iis statui postulare videan-
 ‘ tur ; placeat vobis, ut nulli, aut theologiæ
 ‘ baccalaurei aut artium magistri, five in
 ‘ propriis five in conductis ædibus, five in
 ‘ collegio aliquo commorantes, atque ibi-
 ‘ dem in tabulis nomina sua bonâ fide non
 ‘ habentes, apud vos in posterum jure suf-
 ‘ fragii fruantur, nisi qui per sponsores ido-
 ‘ neos a domino procancellario coram aca-
 ‘ demiciæ registrario approbandos, omnia ex-
 ‘ ercitia gradui & facultati suis competentia,
 ‘ tum in templo beatæ Mariæ, tum in scho-
 ‘ lis publicis se præstare pollicentur, neque
 ‘ ad hoc jus admittantur, nisi peracto inte-
 ‘ gro trium mensium spatio, post datam do-
 ‘ mino procancellario hac in re fidem, utque
 ‘ hæc gratia vestra legis vigorem obtineat
 ‘ et procuratorum libris inscribatur : ” — and
 ‘ it being admitted on both sides, that if the
 ‘ said grace was to be regarded as valid, and
 ‘ ought to have been observed at the said
 ‘ election of a vintner, the majority of votes
 ‘ would fall upon Mr. Bacon ; their lord-
 ‘ ships proceeded to a particular considera-
 ‘ tion of the said grace : and upon hearing
 ‘ what

what was alledged on all sides, their lord-
 ships do agree humbly to report as their
 opinion, that the said grace is very just and
 reasonable, and ought to have been re-
 garded as good and valid, and that the
 said vice chancellor pursuant thereto ought
 to have ordered the said John Bacon to be
 declared duly elected, and to have affixed
 the university seal to the appointment of
 the said John Bacon to be a vintner of the
 said university, in such manner as is usual
 on the like occasions :

His majesty in council taking the said
 report into consideration, was pleased to ap-
 prove and confirm the same, and to order,
 as it is hereby ordered, that Dr. Lambert,
 vice chancellor of the university of Cam-
 bridge, do cause the said John Bacon to be de-
 clared duly elected a vintner of the said uni-
 versity, and the university seal to be affixed
 to an appointment of the said John Bacon to
 be vintner of the said university, in such man-
 ner as hath been usual on the like occasions.

Edward Southwell.

But you will tell me perhaps, that you
 do not see the necessity of desiring the in-
 terpo-

terposition of the crown upon this occasion, and that the right in dispute had much better be settled amongst ourselves. But then, how does it appear that the vice chancellor and senate are authorized to settle it accordingly? The crown gave us the body of statutes, by which we have been governed for these last 180 years; a question arises about the sense and meaning of these statutes, and particularly how far the chancellor's authority, as laid down in some instances, is subject to a limitation prescribed to it in others. The makers of statutes, or, in defect of them, their successors and representatives, are generally supposed to be the only persons authorized to interpret them, unless that power is expressly delegated to some others, and the successors of queen Elizabeth have frequently interpreted and explained those of the university accordingly; and therefore, before any attempt is made by us to exercise any such power, it is highly necessary to inquire how far we are possessed of it. A clause in the last of these statutes gives some power of that kind to the chancellor and heads; but nothing can be concluded from thence in favour of the senate's claim at least; especially

cially if it be considered, that one of the complaints made by the body, soon after the queen gave these statutes, was that, whereas the power of interpreting all statutes was "in majori & saniori parte regentium & non regentium," *the heads alone* have a power of interpreting statutes given them by queen Elizabeth's statutes. By the 42d statute indeed, the chancellor with the consent of the whole university is permitted to make new statutes, "ad eruditionis amplificationem & decori atque honesti conservationem;" but how learning will be promoted, or virtue and decency better kept up, by making all matters of discipline appealable, I own I see not: besides, this power of making statutes is given under this express restriction and limitation, "sic ut ea his decretis nostris nihil detrahant aut officiant." I have before endeavoured to shew, and the opinions of the two eminent lawyers I have recited authorise me to say, that an appeal in matters of discipline is prohibited by the royal statutes: and can the vice chancellor then, with the concurrence of the senate, make any alteration in the constitution of the university in this particular, without being guilty of a violation of the statutes,

statutes, for which both he and they may be made to answer before a higher tribunal ? Besides, if such an alteration was made, and if the crown should take no umbrage thereat, yet no one could answer for its duration and efficacy. The very next vice chancellor might look upon it, as contrary to queen Elizabeth's statutes, and consequently ipso facto null and void ; and insist upon his sentences in causes of correction being unappealable as heretofore : and thus after all, we should be set down again just where we were at first.

BUT you will urge, that the authority of the vice chancellor and senate must be supposed to be the same now, as it was soon after these statutes were given ; and that it is evident from several instances mentioned in the introduction to Mr. B——'s reply, that our predecessors thought they had a right to alter them then, notwithstanding the prohibition quoted above. Instances of that kind may indeed tend to shew the temper of the university at that time, but what else can be concluded from them I confess I cannot imagine : for we are not now inquiring, what any set of men *would*
do,

do, or thought they might do, but what they legally and statutably could; and however precedents may help to enforce a dubious right, they never can establish one that is expressly prohibited. I shall proceed, however, to consider the instances given by that gentleman, which, I think, are three.

1. The alteration made in the choice of scrutators.
2. The giving all doctors a right to prick for vice chancellor, &c.
3. The obliging heads of colleges and doctors to take their turns in preaching on holidays, and in the afternoon course at St. Mary's.

WITH regard to the first, the case is this, The 36th of queen Elizabeth's statutes directs, that two non regents shall be chosen scrutators by the non regents, at the same time that two regents are chosen proctors by the regents; that such and such persons shall stand in scrutiny to take the votes, and that the persons upon whom the majority falls shall be declared elected, sworn in by the chancellor, and enjoy the office of scrutator for that year. In less than three years after the queen gave us the body of statutes of which this is one, a grace was

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made

made to the following effect, viz. *that in order to take away entirely for the future all matter of dissension upon the election of scrutators*, they should be nominated by particular colleges in the order observed in the nomination of proctors, and afterwards be elected in the same manner as they and the taxers, except only as far as far as related to the forms of scrutiny in those elections ; for in that point the direction of the statute *de electione scrutatorum* was still to take place. The university knew, that the queen had confirmed by her visitors in the first year of her reign, the cycle made by their syndicks with regard to the order of nominating proctors, that she had inserted it afterwards into her own body of statutes in 1570, and had ordered it to be observed also in relation to taxers ; they knew likewise, that her only motive for doing this was, to preserve the peace and quiet of the university ; and they had the utmost reason to presume, that she would have established the same rule in regard to scrutators, if she could have foreseen the dissensions a popular election had occasioned : what wonder therefore that, under such circumstances, and upon so just and equitable considera-

derations, the vice chancellor and senate should establish it themselves. In short, the queen had permitted the election of scrutators to be popular; but the very electors, made sensible by experience of the mischiefs attending such elections, chose to give up their own right: now I leave you to judge, whether the queen had any reason to be displeased with this alteration, which was indeed prejudicial to their rights, but not at all so to her power and authority; and particularly, whether Mr. B—— could justly say, that *Scrutators are chosen to this day, expressly against the directions of these statutes, according to that grace*; when that grace does not substitute any regulation of its own in the room of a statute of the queen, but only a direction given in two of those very statutes in the place of a permission in another of the same.

BUT Mr. B—— adds, that *The preamble to that grace is very extraordinary, in which the university seem tacitly to disallow the queen's authority, and express themselves as if the statute for the choice of scrutators had been of their own making.* The preamble of which he speaks is not in the grace book, where

one would naturally expect to find it, nor in the vice chancellor's book of statutes; and though it is in the junior proctor's book, I do and must insist, that Mr. B—— himself might have seen if he had pleased, and that every reasonable man actually will see almost at the first inspection, that it does not so much as run in the name of the university, and consequently was never passed nor approved by them, nor made a part of the grace as he supposes. But let the preamble speak for itself, and that with greater exactness than Mr. B—— permitted it to do.

“ *QUIA* legibus nihil magis propositum fit quam ut litium materia amputetur, hactenus autem scrutatorum electioni adeo a
 * majoribus nostris prospectum non fuerit, quin singulis annis ea de re multiplex contentio ac perturbatio extiterit, ut ei incommodo legitimis modis occurreretur, visum est rogationem quandam super ea re 29^o die
 Junii

* If Mr. B—— had reflected, that there were scrutators before the queen gave her body of statutes, and that their election was popular, he might have seen a reason for this expression, very different from that which he has been pleased to assign for it.

Junii anno domini 1573, in plena regentium & non regentium congregatione Senat. ferre. Cui quidem rogationi cum a majori parte senatus assensum fuisset, placuit eam pro statuto in perpetuum habere. Ejus autem formula sequitur in hæc verba——*Ut omnis deinceps super electionem scrutatorum dissensionis materia omnino tollatur, placeat vobis ut, &c.*"

WHAT then is this *very extraordinary preamble*, from which Mr. B—— would draw so very extraordinary inferences, but the voluntier performance of the person who entered the grace in the proctor's book; and who took into his head to prefix a little historical account of the reasons for passing it, little imagining that this should afterwards be mistaken for the preamble to a *grace*, which had already one of its own? But some people have a strange propensity to fall into such mistakes at least, as they think may not readily be detected, and in the mean time are capable of doing considerable service to the cause they have espoused.

AGAIN,

AGAIN, whatever that gentleman might think, the university, as a body, were never likely to *disavow even tacitly the queen's authority* : and though some particular persons might be well enough inclined to do it, a case, which was then recent, taught them to conceal at least such their inclinations. The case I mean was that of Mr. Rookery, B. D. of Queen's college ; who, for speaking disrespectfully of the queen's statutes a few months after they were given, was deprived of all college emoluments for one month, and ordered to be expelled if he refused to make a recantation. But in short, though *when these statutes were first read to the university, they might shew their misliking by denying thanks to the queen and the chancellor*, that seems to have gradually wore off, and to have been changed at length into an entire approbation of them ; inso-much that, upon the death of this great and good queen, they ordered by a *grace* of the senate, that *As the body of the university had received innumerable and unspeakable benefits from that high and mighty princess, which neither could nor ought to be forgotten, the preacher of the university, or his assign, in his*

sermon

sermon ad clerum, whereunto he is tyed by the statutes, should yearly for ever thereafter give God thanks, as well for her faithful departure out of this life, as for her inestimable favours bestowed upon the university.

As for the second particular instanced in by Mr. B——, there was indeed a *grace* passed in the year 1580, and entered in the junior proctor's book, to empower all doctors to prick for vice chancellor, &c. but then it does not appear ever to have been observed. It cannot be supposed to have been the fault of the doctors, who were to derive a new branch of authority from it, nor yet of the body who conferred it upon them, that so popular a law had not its full effect. To what then shall we impute it? To what indeed, but to a thorough conviction of its invalidity, because of its contrariety to the statutes of the queen?

WHAT is here said of the second may (*mutatis mutandis*) be said also of the third; for neither is there any evidence of the *grace* relating to that having ever been executed. And though this same gentleman has been pleased to add, that a much later *grace* for obliging

obliging doctors to take their course in preaching on the state festivals, *is expressly against the appointment of queen Elizabeth's statutes c. 11*; yet I am persuaded, that if you will but take the trouble to read the whole of that, and the preceding chapter to which it has a manifest reference, you will not think, that the clause quoted by him must necessarily be understood to exempt them from any other labour, than what had formerly attended the *necessary* continuance of their regency, upon the footing of the old statutes. I might add, that even in case queen Elizabeth did intend to exempt doctors of divinity from a necessity of preaching, that exemption could only be supposed to extend to such times and occasions as they had heretofore been obliged to a performance of that duty upon, and not to a couple of state festivals of so late dates and institution, as the accession of king Charles the first, and the return of his son to the throne of his ancestors.

I SHALL now leave you to make the most of these three *formidable* objections, and proceed to consider the *grace* which was proposed on the part of your friends.

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If great dissensions had arisen frequently in the university, as is mentioned in the preamble to that *grace*, on account of appeals; it was manifest that, as well those who claimed a right to them, as those who refused to admit it, founded their respective opinions upon the statutes: was it not then natural to expect, that recourse should have been had to a competent authority, in order to have the sense of the statutes in that particular fully settled and ascertained? No other method could properly be pursued in this case, nor I am apt to think ever was pursued in any other of a similar nature: but here, for reasons best known to the authors and advisers of such a step, instead of setting on foot a regular inquiry into the foundation, upon which an appeal was claimed on the one hand, and denied on the other; instead of proposing the proper, or indeed any method, by which this disputed right might be *judicially* determined; a *grace* is brought up to the vice chancellor, purporting that he should give up the very point he was contesting; a point too, which had never been given up in any instance, till within the last six and twenty years; and which two of the ablest lawyers in the king-

dom assured him, could not, consistently with the statutes, be given up now. Of all the proceedings I ever heard of, this was certainly the most summary and compendious: the settling disputed claims in a regular and legal way, compared to this, is tedious indeed. But then, whether it is the most reasonable and equitable way of proceeding likewise, may justly be questioned; and I am persuaded that you yourself, upon cooler and more mature consideration, must acknowledge it is not.

AGAIN, it was proposed by this *grace*, not only to oblige the present and every succeeding vice chancellor to admit appeals from every judicial sentence of his, but *ab omni gravamine ab eodem utcunque illato*. What particulars would come, or rather would not come, within the description of *gravamina*, it is hard to say; but thus much at least is certain, that the expression is general enough, to warrant the arraignment of the principal magistrate of the university before delegates, upon no very important occasions. We have seen one attempt to arraign him accordingly in the year 1725, for reasons slight enough; and though that
did

did not succeed, if such a *grace* as this was once established, others of the same nature might be made afterwards with better success. I for my own part can conceive it very possible, that few steps could then be taken by a vice chancellor, in matters of correction at least, in which some *gravamen* or other would not be pretended; and then the case would be finely inverted, and he, instead of animadverting upon the supposed offender, would be liable to be brought by him before delegates, and perhaps censured for his proceedings in order to such animadversion. At present no appeals, even in causes between party and party, can be made otherwise than from the *sentence* of the vice chancellor, as is plain from the words of the statute; and this was not only the opinion of delegates in 1725, but of delegates also, in the causes of *Rose contra Cook* and *Ducket procuratores*, and of *Nicholson contra eosdem*, so long ago as the year 1596: but if this new law was once established, scarce any acts of the vice chancellor of any kind, might not be interpreted *gravamina* by persons who were so disposed; omissions would come under the interpretation as well as acts of commission; and

whether he did or did not take cognizance of an affair, whether his proceedings were summary or otherwise, or his determinations quick or dilatory, one party or other would pretend to be *aggrieved* thereby.

I SEE no probability however of any such *grace* having the concurrence of the vice chancellor and senate, nor indeed any reason why it should. Some reasons there certainly are, and those very cogent ones, why it should not ; such as, the subjecting such acts of the vice chancellor to the controul of delegates, as are plainly and clearly neither so subjected at present nor ever ought to be, and altering the constitution of the university in manifest opposition to the royal statutes.

THE learned gentlemen of the long robe, whose opinions I have recited above, have pointed out the absurdity of making all cases appealable, and the pernicious consequences with which it would be attended ; and both these objections are considerably heightened, on the footing of the *grace* we are now considering. But there is still another particular in it, of which I cannot help

help expressing my dislike. Every member of the university is to derive from it in every case a right of appeal ; but then, under graduates are not to be permitted to exercise this right, otherwise than by the interposition of their tutors. To me at least this appears extremely strange ; because, by means of such a limitation, a tutor might prevent his pupil from appealing in any case, though the supreme magistrate of the university would be empowered to prevent it in none.

You will urge, I doubt not, that a tutor must be supposed to be a better judge of the equity of a sentence than the pupil ; and as a previous oath must be taken by him, that he believes in his conscience that his pupil has a just cause of appeal, all appeals would by this means be prevented but such as were founded upon good reasons. But the force of this argument will not be thought very great, if it be remembered, that though oaths of this kind were exacted in order to prevent the frequency of appeals, they by no means had their proper effect ; the same number having been commenced for the three years next after this

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regulation, as in that towards the close of which it was first made. Besides, the advocate or proctor in every cause, who I fancy will be allowed to be at least as good a judge of the justice of a sentence as a tutor, was thereby obliged to take the oath in case of an appeal ; and yet I believe it would be difficult, to find so much as a single instance of his declining to take it accordingly. Add to this, that as the tutor need never take the oath unless he has an inclination so to do, and the pupil could have no relief unless he should take it ; the former might, and possibly sometimes would, deprive the latter of his exercise of this right of appeal, even in cases of real grievance.

IN short, I see not how a grace of this kind could be offered, consistently with the resolution said to have been taken at one of your first meetings, to assert the right of appeal in such a manner as was warranted by the statutes of the university : nor am I less unable to reconcile it with those professions of deference and respect, which at the same time were thought proper to be made for our great and illustrious chancellor. No person would receive a greater
plea-

pleasure than myself, from seeing all the members of the university, however divided in other points, agreed in entertaining the highest sentiments of regard and veneration for him ; but I confess that this is a pleasure I am not very likely to have, till one set of men shall be pleased to give clearer and less questionable testimonies of this, than by opposing every useful regulation he recommended, and endeavouring to lessen and curtail an authority, which is only vested in the vice chancellor as his representative and locum tenens.

FROM what has been said in regard to appeals in general, and to such as this *grace* was designed to authorize in particular, you will be the better enabled to judge of the propriety of that other, which proposed the appointing syndicks, to search the records of the university for every thing relative to the point in question, and then to lay the whole before his majesty and council, in order to receive a final determination. At least you will see that proposal in a different light, from what you have hitherto been taught to consider it in ; and particularly, that the constitution of the university was
not

not in so very great and imminent danger therefrom, as to justify the clamour that was raised, and the opposition excited against it, by circular letters sent to the distance of forty or fifty miles, desiring the attendance of all those, who had any sparks of filial tenderness and affection left for their alma mater. Though this has been generally imputed to an unwillingness to have the matter canvassed before *that tribunal in particular*, I am far from considering it in such a light, as being persuaded, that your friends have reason to be equally diffident of its success, and consequently to be equally averse to having it examined before *any other*, an academical one only excepted. It would not indeed be easy to assign any reason, why they should be *particularly unwilling* to carry any complaints they had to make against the vice chancellor, where those against the heads and other members of diverse colleges both here and at Oxford can alone be carried; especially if it be considered, that the members of those several societies, of which his majesty is visitor, might just as well pretend to set up some other authority to hear and determine their differences, as those of this university dis-

claim

claim the king's visitatorial power. In short, his majesty, who is the fountain of justice, cannot but be ready to hear, and as ready to redress, every grievance that is real ; delays of justice are as little to be apprehended from him, as denials of it ; and as a proof of this, I might instance in the case of Bacon mentioned above, where the royal determination was given with greater dispatch, than is usual even with local visitors : but then let it be remembered, that he is no less authorized to interpose for the preservation of his own rights, than of those of private persons ; and therefore, if instead of carrying complaints against a chancellor or vice chancellor where they ought, they are carried where they plainly ought not ; and attempts are made to render the head of the university accountable for his conduct to the body, and that in instances wherein he is accountable to the crown alone ; I leave you to judge, what consequences such steps as these may possibly be attended with.

Thus have I laid before you my sentiments on the right of appeal in matters of discipline ; and at the same time the reasons

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upon

upon which they are founded, that you might be the better enabled to judge, how far a person, who has agreed with you in most other particulars, is justifiable in dissenting from you in this. As these have already swelled to a much greater bulk than I imagined they would, I shall make no further addition to them than by transcribing part of a letter writ almost 120 years ago by Mr. Tabor, who had then been registrar of the university upwards of thirty years.

‘ What dangerous cure does that state hazard, when for the sullen distemperature of one active member, the ruling head must bleed that suffereth enough otherwise, and all the discontented parts of the body must sit in judgment on it; nay, when sense must disapprove or disallow the acts of reason. If this appeal be suffered and countenanced to pass current, farewell the power of chancellor and vice-chancellor, my young masters of the regent house will and must judge examine and rule all; yea, *their* censures or judgments must stand or be disallowed at their will and pleasure. Good sir! by all means labour to smother this hydra; it will have more heads than we shall overcome, and

‘ breed

"breed a greater mischief than we are aware, in these times of liberty and discontent."

F I N I S.



A P P E N D I X.

AS the author of the *Authentic Narrative*, &c. assures his readers, that no material circumstance is omitted in it; I shall make no apology for laying before you the following observations upon it, which have lately been communicated to me.

THE particular event that gave rise to the present dispute, on the right of appeal in matters of discipline and correction, has been lately set forth in what is called an *Authentic Narrative*, &c. and though it has not been thought necessary, by those who were immediately concerned, to justify every step that was taken on that occasion, or to shew the imperfection of that address

to the public ; the following observations, made after the strictest enquiry into the truth of the facts, may perhaps be sufficient to shew, that the narrative is not quite so authentic as might have been expected ; that many material circumstances, which were necessary to give the public a right information on that subject, are omitted ; and that there was not so much malice, partiality, or rigour, on the side of authority, as is suggested by the author of that performance.

I. THE proctor did not complain to the vice chancellor till a day and a half had passed from his having received the insult at the Westminster club. In which time, there is great reason to presume, that if the gentlemen concerned had made to him some acknowledgment of their improper conduct, no farther notice had been taken of it.—The proctor did not accuse the members of the club of any intemperance, nor did he find any fault with the celebration of their anniversary ; but merely complained to the vice chancellor of the *personal* ill treatment he met with, and of the indignities offered to his *authority*.

IT is evident that he did not intend to * *surprize* them; because he sent, in the morning of the day on which the club met, to a young person of distinction who, as he had been informed, was to have been the president of the club, and acquainted him, that he intended to visit the Westminster club that night.—No reason has ever been assigned for supposing, that the proctor was actuated by any † *malice* and ill-will to the gentlemen educated at Westminster school: nor does it appear, that he meant a rigorous execution of the new regulations; for at his going into the room he only said to the president, that he came to see that the younger part of the club should retire to their respective colleges: a direction, which a proctor would have given in any company at an earlier time of the night, though there had not been any new regulations established on that head.

2. THE ‡ *modesty* of the conversation with the vice chancellor may be much questioned, even from the representation given

* Nar. page 4.

† Ib. p. 6, 31.

‡ Ib. p. 5, 6, 24, 25.

given of it in the narrative. It partly consisted of a censure of him for *receiving* an accusation from an officer next in power to himself; and partly tended to deter him from proceeding to a trial in a matter of public accusation, for fear of consequences.

MR. F——N, in this conversation, I am well assured, laid great stress upon the want of punctilio in the proctor, and thought it would justify any resentment on his part. To which when the vice chancellor had answered, that a want of punctilio could not well be urged in a court, Mr. F——n, turning himself to Mr. C——w said; *If what each side has to alledge in its defence will not be attended to, we must appeal to the senate.*

It is to be observed, that no proposal was made on the parts of these gentlemen for an accommodation with the proctor; on the contrary, their perseverance in asserting their own innocence, and their charging the proctor with great defect of good behaviour towards them, gave little room to endeavour at making up the matter, sup-
 posing

posing it had been practicable on other accounts.

BUT if the parties concerned had been disposed to a mutual accommodation, would it have been adviseable for the vice chancellor to have taken such a step? Would not that have been considered, as a clandestine huddling up of an affair, that ought to have been the subject of public enquiry? Would it not have been called a screening of some particular persons concerned, and have raised a much greater clamor than what actually did prevail from citing them to a public trial; which, however disagreeable to the parties accused, was loudly demanded by the grave and senior part of the university?

3. DURING this interview with the vice chancellor, Mr. A——ll desired to know what the proctor had accused him of. The vice chancellor *acquainted him with the particulars, and Mr. A——ll made his observations upon them: and it was on this information from the vice chancellor that
Mr.

* Nar. p. 26.

Mr. A——ll drew up the defence, which he had prepared, and brought written down to the law schools.—Nor was it 'till the day after this interview had been with the vice chancellor, that the citation was served or signed, as appears from the date of it.—These facts being such, with what justice does Mr. A——ll complain in the following words? *As this citation has given countenance to such reports, I cannot but think it a hardship, that I was not indulged with a hearing, before Mr. vice chancellor had so far given a kind of sanction to the calumny.**

THE consultation with the heads, about the manner in which the vice chancellor should proceed in so unusual a case, can with no propriety be called a prejudication of the † matter, as a public trial was afterwards to ensue.

4. BESIDES the ‡ matter of Mr. A——ll's speech, great offence was taken at the manner with which it was delivered. His address, at the first setting out, was made to the vice chancellor, and || gentlemen of the univer-

* Nar. p. 26.

|| Ib. 31, 13.

† Ib. p. 25.

‡ Ib. p. 18, 26, &c.

university, directing his voice and looks to the galleries. And afterwards, when the vice chancellor had in vain endeavoured to silence the uproar occasioned by many passages in the speech, Mr. A——ll called aloud, “Gentlemen, we desire that you would *on our accounts*, be quiet.”

5. *AFTER it had been agreed by the vice chancellor and his assessors, that Mr. A——ll should be suspended for his contemptuous behaviour during the course of his defence; on the morning of the day on which the vice chancellor was to pronounce his sentence, he desired a person of great standing and distinction in the university, to go to Mr. A——ll, and acquaint him, that if he would make an acknowledgment of his fault before sentence was delivered, the vice chancellor would not proceed to that part of the sentence which related to the suspension. The gentleman went, and thought he found Mr. A——ll in a disposition to comply with the proposal; but judging that there might be some dispute, about the terms in which the submission

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should

* Nar. p. 60.

should be made, he came back to the vice chancellor, in order to settle the form. This was wrote down by the vice chancellor, and is as follows.

“ Mr. A——ll is to declare, that he acknowledges to have offended against the dignity and authority of the court ; thinks it was improper behaviour in him ; is concerned for it ; and requests of the vice chancellor to overlook it.”

THIS was sent ; but the gentleman, on his return, found Mr. A——ll so averse to the making any acknowledgment, and so resolute upon *appealing from the sentence*, that he would not even *see* the form that was drawn up for his submission.

THE vice chancellor proceeded to declare his sentence ; and, at the close of it, told Mr. A——ll, that *the suspension was to continue only 'till he made his submission*.

6. THE vice chancellor, though supported in his * refusal of the appeal by the concurrence

* Nar. p. 61.

currence of the heads of colleges his assessors, and several other considerable persons of the university, was desirous of having the opinions of two eminent lawyers on so important an affair, before he made his final resolution; and it was wholly owing to a delay in procuring the opinion of one of these gentlemen, that the vice chancellor did not give his answer to Mr. A——ll sooner.

7. THE appeal was refused *, because it appeared not grounded on the statutes of the university: but as this has been formerly a subject of dispute, the vice chancellor has shewn himself willing to have the matter referred to its proper judge.

* Nar. p. 62.

F I N I S.

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